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No. 89-973

In the Supreme Court of the United States

OCTOBER TERM, 1989

ANNMARIE LOWE and MARIE DELISI,
Petitioners,

-against-

COMMACK UNION FREE SCHOOL DISTRICT,
JOSEPH DEL ROSSO, As Superintendent of Schools,
and ROBERT L. DAVIS, As Assistant Superintendent of Schools,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 886 F. 2d 1364 and is reprinted as Appendix B to the Petition at p. A3.

The unreported Memorandum Decision of the United States District Court for the Eastern District of New York (Wexler, D. J.), dated November 18, 1988 is appended hereto pursuant to Rule 21.1(k)(ii). This decision which denied respondents' motion for summary judgment, is reprinted as Appendix A at p. A1, *infra*.

JURISDICTION

Invoking Federal jurisdiction under 29 U.S.C. §626 (c) (1), the petitioners brought this suit in the Eastern District of New York. On November 18, 1988, the Eastern District denied the respondents' motion for summary judgment. See p. A1, *infra*.

After a jury trial, a judgment dated January 26, 1989 was entered by the District Court on January 30, 1989 in favor of the respondents and against the petitioners dismissing the complaint with prejudice.

On petitioners' appeal, the Second Circuit entered a judgment and an opinion on September 21, 1989, affirming the Eastern District's judgment. *Pet.*, p. A44. No Petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 U.S.C. §623(a)(1) — Prohibition of Age Discrimination

It shall be unlawful for an employer ... to fail or to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

29 U.S.C. §631(a) — Age Limits

(a) Individuals At Least Forty Years of Age

The prohibitions in this chapter ... shall be limited to individuals who are at least forty years of age.

STATEMENT OF THE CASE

Petitioners had been employed by the respondent Commack Union Free School District (respondent School District) as tenured elementary school teachers until 1976. Faced with declining enrollment, the respondent School District abolished a number of teaching positions. As a result of their relatively low seniority, both petitioners were "excessed" in 1976 pursuant to New York State Education Law §2510(2) (McKinney, 1981). They were placed upon a preferred eligible list of candidates for appointment to any vacancy in the elementary teaching tenure area that might occur. They remained on the preferred eligible list for seven (7) years, as required by §2510(3) of the New York State Education Law (McKinney's, 1981). No vacancies occurred during that time and their right to be rehired expired in June, 1983.

While petitioners were waiting for vacancies to occur, both accepted positions in the respondent School District as teacher assistants.

In November, 1985, the respondent School District decided to adopt the New York State Retirement Incentive Program. Under the program, teachers age fifty-five (55) or older were given financial incentives to retire. The School District adopted the program because it was faced with declining enrollment and the necessity of reducing

staff. As a result, respondents expected there would be elementary teaching vacancies for the 1986–87 school year.

The respondent Joseph Del Rosso (respondent Del Rosso), as Superintendent of Schools, and Joseph Heinlein, the Director of Personnel, developed a process for the hiring of teachers to fill the thirteen vacancies that occurred.

The respondent, Robert L. Davis (respondent Davis), became Assistant Superintendent of the respondent School District in May, 1986. Respondent Del Rosso instructed respondent Davis to oversee the process established by him and the Director of Personnel for the 1986–87 school year.

Two separate procedures were established. One procedure was used for candidates previously employed by the respondent School District as teacher assistants or preferred substitute teachers (internal candidates) and another procedure for candidates applying from outside the School District (external candidates).

All internal candidates, including petitioners, were given an opportunity to be interviewed and to take a writing sample test. The interviews were conducted by six school administrators selected because they were likely to have vacancies in their schools for the 1986–87 school year. Each internal candidate was to be interviewed by two administrators in a single interview. The administrators all had experience in interviewing and evaluating teachers. One interviewer, who interviewed both petitioners, testified that in interviewing candidates generally, he asked questions "concerning, firstly, their knowledge of

subject matter; secondly, their ability to make provisions for group instruction, their ability to evaluate children in the classroom other than just a written test, and finally I seek to get from a candidate how well they can communicate to me and also to children in the classroom". *Pet., App. B,* p. A8. Each interviewer was to rate the candidate in terms of "yes" or "no".

The writing sample test, administered after the interview, was designed to test the candidates' writing abilities and, to a lesser extent, their substantive knowledge of educational topics. Each writing sample test was graded by an administrator who was unaware of the identity of the candidate. Writing ability constituted 7.5 points and content constituted 5.0 points for a maximum score of 12.5.

Thirty-seven internal candidates, including petitioners, took part in the process. Respondent Davis compiled the results of the interviews and writing samples. He undertook to reduce the number of internal candidates by 2/3 pursuant to objective criteria. He examined each candidate's interview rating and writing sample score to determine whether he or she would be placed in a pool of eligible candidates. Candidates who received two "yes" evaluations in the interview and a writing sample score of 8.0 or higher survived the cut and were placed in the pool. Candidates who received one "yes" and one "no" in the interview and a writing sample score of at least 9.0 were also placed in the pool. No candidate who received two "no" evaluations in the interview was placed in the pool regardless of his or her score on the writing sample test.

Fourteen internal candidates survived the cut and were placed in the pool. Petitioners were not placed in the pool.

Petitioner Lowe received two "no" evaluations on her interview and a writing sample score of 8.25. She was not placed in the pool because no candidate with two "no" interview ratings survived the cut. Petitioner Delisi received one "yes" and one "no" from her interviewers and a score of 7.5 on the writing sample test. She was not placed in the pool because her writing sample score was lower than the 9.0 required of candidates who had received one "yes" and one "no" in the interview.

Over 700 external candidates applied for the thirteen positions.[1] Respondent Davis requested the personnel office to narrow the number to 100 by means of a "paper-screening" of applications and resumés based on the candidates' experience, certifications and schools attended. He further narrowed the 100 applications to approximately 35 based on their records. The 35 candidates were invited to be interviewed. Twenty-five were interviewed personally by respondent Davis. One candidate, Robert Minott, whom Davis knew, was interviewed by another school official.

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[1] Contrary to petitioners' statement in footnote 2 on page 3 of the Petition, the School District retained the applications of the external candidates. The record is clear that the respondents' application forms do not ask the age of an applicant so that information relative to age was not available to the respondents during the hiring process, nor to the petitioners thereafter.

Nine external candidates survived the interview process and went on to take the writing sample test. One candidate scored 8.75 on the sample. All others scored 9.0 or above. They were placed in the pool together with the fourteen internal candidates.

Candidates from the pool were sent to principals of schools with vacancies. The principals interviewed candidates and made recommendations to respondent Davis which he in turn passed on to the respondent Del Rosso, as Superintendent of Schools. The Board of Education of the respondent School District accepted the recommendations. Eight internal candidates and five external candidates were selected and hired for the 1986–87 school year to fill the thirteen elementary positions.

Petitioners filed a complaint in the United States District Court for the Eastern District of New York alleging four causes of action. First, they alleged the respondents' actions in failing to hire them constituted a violation of the ADEA, 29 U.S.C. §623 (a) (1). Second, they alleged violations of their civil rights under 42 U.S.C. §§1983, 1988 (1982). Third, they alleged a pendent state claim based on N. Y. Exec. Law §296(3-a) (McKinney, 1982 and Supp. 1989). Finally, they alleged another pendent state claim based on N. Y. Educ. Law §3027 (McKinney, 1981). They sought appointment as elementary school teachers as of the commencement of the 1986–87 school year, together with back wages and benefits. They also sought liquidated damages under the ADEA, 29 U.S.C. §626(b) (1982), compensatory damages, costs and attorneys' fees. A jury trial was demanded.

Respondents filed a motion for summary judgment. Although the District Court denied respondents' motion, it stated: "[a]lthough defendants appear to have a strong defense, the court cannot conclude that summary judgment is warranted". *App. A*, p. A10, *infra*.

At trial petitioners offered evidence calculated to show they had been denied employment because of their ages. They were fifty-two at the time teachers were hired for the 1986–87 school year. They pointed to the adoption of the Retirement Incentive Program in an effort to convince the jury the respondents did not want to hire teachers near the retirement age of fifty-five because it would be more expensive than hiring younger teachers. They also argued the respondents' explanation of their hiring procedures concealed their true intent to replace retiring teachers with younger teachers and not new teachers who were approaching the retirement age of fifty-five. They argued that this intent was demonstrated by discrepancies in the hiring process.

They pointed to one fifty-five year old internal candidate who had received two "yes" evaluations on her interview and a writing sample score of 9.5, yet had not been included in the pool. Petitioners suggested her age explained the exclusion. Respondents offered evidence that her scores notwithstanding, she had been excluded due to an earlier disciplinary problem. The discrepancies were used in an effort to persuade the jury that age was a factor considered in the hiring process. Respondents satisfactorily explained all discrepancies and convinced the jury that age had played no part in any of the hiring

decisions as evidenced by the verdict in favor of the respondents.

Petitioners took an appeal to the Second Circuit invoking the Second Circuit's jurisdiction under 28 U.S.C. §1291 to review "final decisions" of District Courts.

The Second Circuit noted that by emphasizing the respondents' allegedly discriminatory motives throughout the trial, petitioners stressed the disparate treatment aspect of their case. The court nevertheless found they had also pressed their disparate impact claim and they were not precluded from proving age discrimination by means of disparate impact. *Pet., App. B,* p. A15.

There is no indication the District Court refused to give a disparate impact charge because the challenged hiring practices involved subjective hiring practices. Rather, the District Court refused to give a disparate impact charge because Lowe and Delisi failed to present a *prima facie* case.

The Second Circuit questioned as an initial matter whether petitioners adequately identified at trial:

> "'the specific employment practice that is challenged' *Wards Cove,* 57 U.S.L.W. at 4547 (quoting *Watson,* 56 U.S.L.W. at 4926–27). Their purported statistical proof is little more than a compilation of the results of the hiring process. Even on appeal, they seem unable to meet their burden of 'isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities'." *Pet., App. B,* pp. A16, 17.

The Second Circuit held petitioners failed to demonstrate a *prima facie* case of disparate impact because they failed to demonstrate that any of respondents' hiring practices "caused the exclusion of applicants for jobs ... because of their membership in a protected group."

Likewise, Judge Pierce in his concurring opinion, while advocating, *in dicta*, the use of subgroups in a disparate impact analysis, noted:

> "Notwithstanding my disagreement with the majority, I concur in the judgment of the court. Even assuming acceptance of the sub-group theory, I believe appellants have failed to demonstrate a *prima facie* case of disparate impact caused by a specific employment practice, as *Wards Cove Packing Co. v. Atonio* requires. 109 S. Ct. 2124–25 (1989)." *Pet., App. B*, p. A42.

Accordingly, the Second Circuit affirmed the District Court's judgment dismissing the complaint with prejudice.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE SECOND CIRCUIT'S DECISION WAS BASED UPON QUESTIONS OF EVIDENCE AND FACTUAL FINDINGS AND NOT THE QUESTION PRESENTED IN THE PETITION.

The sole Question Presented in the Petition (p. i) is whether a sub-group of the protected class may use the disparate impact analysis to demonstrate a *prima facie* case under the ADEA.

Neither of the courts below decided the case on the above ground. Both courts decided that petitioners' evidence offered at trial was totally inadequate to show a disproportionate impact on the protected class — much less a substantially disproportionate impact. It is important to note that the trial court did not prevent petitioners from offering evidence of disparate impact.

On this record, there is no evidence on which the trial court or the Second Circuit could have found that the employment practices of the respondents selected candidates for teaching positions in an age-related pattern significantly different from the general pool of applicants. Petitioners, therefore, failed to establish a *prima facie* case of disparate impact. *See Connecticut v. Teal*, 457 U.S. 440, 452–56 (1982).

Respondents believe the Supreme Court, upon a grant of *certiorari*, would most likely decide the case upon similar grounds, thus, rendering resolution of the Question Presented irrelevant to the ultimate outcome of the case. Under those circumstances, *certiorari* should be denied. Resolution of the Question Presented would not change the result reached below.

The only question left is the propriety of not submitting the question of disparate impact to the jury. The answer depends essentially upon the District Court's appreciation of the evidence. Neither the District Court nor the Second Circuit found sufficient evidence of disparate impact to warrant submitting the question to the jury. Lacking that, the state of the law applicable to the facts disclosed by this record is sufficiently clear so as to warrant denial of

the Petition. *See Connecticut v. Teal*, 457 U.S. 440, 452–56 (1982); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974); *Sommerville v. United States*, 376 U.S. 909 (1964).

Petitioners state in footnote 4 on page 10 of their Petition that if this court sends the case back, "... the full Court [of Appeals] will have the opportunity to specifically evaluate the case under *Wards Cove Packing Co., Inc.. v. Atonio*, ___ U.S. ___, 109 S. Ct. 2115 (1989), and *Watson v. Fort Worth Bank & Trust*, ___ U.S. ___, 108 S. Ct. 2777 (1988)."

Petitioners make this argument notwithstanding the Second Circuit's finding that:

> Lowe and Delisi expend much effort arguing that subjective hiring practices can form the basis of a disparate impact claim. The appellees do not dispute this point, as it is now established law. See *Watson v. Fort Worth Bank & Trust*, 56 U.S.L.W. 4925–26 (U.S. June 29, 1988). *Pet., App. B*, p. A15.

It is obvious petitioners had an adequate opportunity to convince the Second Circuit that this court's decision in the *Watson* case made a difference since the Second Circuit either quoted or cited the *Watson* decision more than six times. See *Pet., App. B*, pp. A15–17, 20, 23, 41.

The Second Circuit was equally aware of the petitioners' arguments relative to *Wards Cove Packing Co. v. Atonio*, ___ U.S. ___, 109 S. Ct. 2115 (1989) since the Court either cited or quoted the case more than five times. See *Pet., App. B*, pp. A14–18, 42.

In effect, petitioners are asking this Court to send the case back to the Second Circuit for a rehearing. It is submitted that the appropriate procedure would have been for petitioners to ask the Second Circuit for rehearing within the time allotted by the Federal Rules of Appellate Procedure.

II. A CONFLICT AMONG THE CIRCUITS DOES NOT EXIST IN REGARD TO THE QUESTION PRESENTED.

Apparently seizing upon the cases cited by Judge Pierce in his concurring opinion, petitioners claim that a conflict exists between the Second Circuit's decision and decisions in the Third, Fifth and Eleventh Circuits. *Pet., App. B.*, pp. A38 and A40.

All of the cases relied upon by petitioners are distinguishable.

In *Maxfield v. Sinclair Int'l.*, 766 F. 2d 788 (3d Cir., 1985), *cert. den.* 474 U.S. 1057 (1986), the issue was whether an ADEA plaintiff may prove the fourth element of the test established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) for a *prima facie* case by showing that he or she was replaced by a person sufficiently younger so as to permit an inference of age discrimination.

Maxfield was, therefore, clearly a disparate treatment case. Moreover, the Third Circuit counted the Second Circuit among the other circuits known to have permitted a *prima facie* case to be shown through proof that the favored person was younger than the plaintiff.

> All have held that the replacement need not be younger than forty, the age at which ADEA protection begins. See *Goldstein v. Manhattan Industries, Inc.*, 758 F. 2d 1435 (11th Cir., 1985); *McCorstin v. United States Steel Corp.*, 621 F. 2d 749, 753–54 (5th Cir., 1980); *cf. Haskell v. Kaman Corp.*, 743 F. 2d 113, 119, n. 1 (2d Cir., 1984) ... *Id.* at 792.

Also noteworthy is the Third Circuit's citation in the same breath of the very Fifth Circuit and Eleventh Circuit decisions relied upon by petitioners to establish a conflict among the circuits.

In *McCorstin v. United States Steel Corp.*, 621 F. 2d 749 (5th Cir., 1980), use of the fourth factor of the *McDonnell Douglas* test was at issue, thereby confirming that *McCorstin* was also a disparate treatment case.

Likewise, in *Goldstein v. Manhattan Industries, Inc.*, 758 F. 2d 1438 (11th Cir., 1985) the court decided the case on a disparate treatment theory. The only similarity to this case is the plaintiff's failure to provide sufficient evidence to warrant submitting the case to the jury on a disparate impact theory. 758 F. 2d at 1444.

Blum v. Witco Chem. Corp., 829 F. 2d 367 (3d Cir., 1987) may be distinguished on the ground that one plaintiff was replaced by someone outside the protected class. Plaintiffs offered the expert testimony of a labor economist, who provided statistical data revealing that chemists under forty had a 100% retention rate, while approximately two-thirds of the chemists over forty were terminated. A second analysis, apparently not relied upon by the court, used the

age of forty-five as the dividing line. However, the second analysis was merely mentioned in passing and certainly did not form the basis of the court's decision. On the basis of all the evidence, the court determined the evidence was sufficient to support the jury determination that age was a factor in the employer's decision to terminate three chemists in the protected age group. Although cited by petitioners in support of their Petition, *Blum* provides a perfect counterpoint from which to contrast the paucity of evidence of disparate impact in this case.

There must be a real or "intolerable" conflict on the same matter of law, not merely an inconsistency in dicta, before the court should exercise its discretion to grant a petition for *certiorari*. See, for example, *Lorillard v. Pons*, 434 U.S. 575 (1978) in which the Court granted *certiorari* (433 U.S. 907 (1977)) to resolve the conflict in the circuits concerning whether or not a plaintiff was entitled to a jury trial under the ADEA. In *Morelock v. NCR Corp.*, 546 F. 2d 682 (6th Cir., 1976), the court held there was no right to a jury trial. *Rogers v. Exxon Research & Engineering Co.*, 550 F. 2d 834 (3d Cir., 1977) held there was a right to a jury trial.

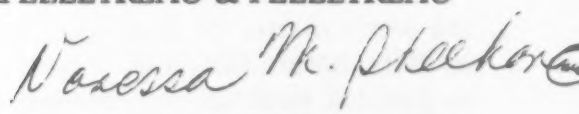
Under Rule 17.1(a), the essential ingredient of an "intolerable" conflict with the decision of another Federal court of appeals is lacking, thus, warranting denial of the Petition.

CONCLUSION

The Petition should be denied because there are no special and important reasons for the issuance of a writ of *certiorari*.

Dated: Patchogue, New York
January 12, 1990

Respectfully submitted,
PELLETREAU & PELLETREAU



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APPENDIX A

MEMORANDUM AND ORDER UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED NOVEMBER 18, 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANNMARIE LOWE and MARIE DELISI,
Plaintiffs,

-against-

COMMACK UNION FREE SCHOOL DISTRICT, JOSEPH DEL ROSSO, AS SUPERINTENDENT OF SCHOOLS, and ROBERT L. DAVIS, AS ASSISTANT SUPERINTENDENT OF SCHOOLS,
Defendants.

MEMORANDUM AND ORDER
CV 87-3506
(Wexler, J.)

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WEXLER, District Judge

Plaintiffs Annmarie Lowe ("Lowe") and Marie Delisi ("Delisi") bring this action pursuant to state and federal laws alleging that they were denied employment as school teachers solely because of their ages. Named as defendants are the Commack Union Free School District ("Commack" or the "School District"), plaintiffs' employer, as well as Joseph Del Rosso, Commack's Superintendent of Schools and Robert L. Davis, Commack's Assistant Superintendent of Schools. Both individual defendants are named solely in their official capacities. Presently before the Court is defendants' motion for summary judgment. Before turning to the motion, the Court will outline the relevant undisputed facts and the parties' contentions.

I. Undisputed Facts

Plaintiffs are two fifty-four year old women who were employed by the School District as tenured elementary school teachers. At the end of the 1975–76 school year both plaintiffs were lawfully excessed pursuant to section 2510(2) of New York State's Education Law. As a consequence of their lawful excess, plaintiffs were placed, for a period of seven years, on a preferred eligible list of candidates for appointment to any vacancy that might occur in positions comparable to those previously held by plaintiffs. In 1979 plaintiffs accepted employment with the School District as Teacher's Assistants and subsequently became tenured Teacher's Assistants. Although the parties disagree as to the proper characterization of a Teacher's Assistant's status, it is clear that the position is not comparable to the teaching positions held

by plaintiffs prior to their excess.

In 1986, three years after the expiration of plaintiffs' recall rights, a number of vacancies occurred in the School District's elementary level. These vacancies were attributable, in large, to the retirement in June 1986 of several elementary school teachers pursuant to New York State's Retirement Incentive Program. Although plaintiffs applied to fill two of the newly created vacancies, neither was hired.

II. Plaintiffs' Complaint

In addition to reciting the above-referenced facts, it is alleged that the decision not to hire plaintiffs was motivated by defendants' unlawful consideration of plaintiffs' ages. Accordingly, plaintiffs seek redress pursuant to: (1) the Age Discrimination in Employment Act, 29 U.S.C. §623 (the "ADEA"); (2) the Civil Rights Laws, 42 U.S.C. §1983 ("Section 1983"); (3) Section 290 of New York State's Executive Law (the "Executive Law"); and (4) Section 3027 of New York State's Education Law (The "Education Law").

In support of their claim of age discrimination plaintiffs point to the "School District's determination, as evidenced by its retirement incentive program, to replace older and costly teachers with younger and less costly teachers." Plaintiffs allege that this policy is evidenced by a statement made by a representative of the Board of Education at a retirement party held on May 28, 1986. According to plaintiffs, the individual referred to stated that the School District "will be hiring young people to replace the retirees."

Plaintiffs further allege, on information and

belief, that none of the teachers ultimately hired to fill the vacancies were as qualified as plaintiffs and that all of the individuals hired were younger than plaintiffs and commanded a salary lower than that to which plaintiffs would have been entitled, had they been hired. Because of the School District's hiring practice plaintiffs claim to have suffered lost wages in excess of $10,000 as well as great emotional distress, anxiety and humiliation.

III. Defendants' Motion

A. General Principles

As noted above, defendants have moved, pursuant to rule 56 of the Federal Rules of Civil Procedure, for the entry of summary judgment in their favor. A court may grant summary judgment only if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56, *Colotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552 (1986); *Donahue v. Windsor Locks Bd. of Fire Commissioners*, 834 F. 2d 54, 57 (2d Cir. 1987). The burden of proving that no material facts are in dispute falls upon the moving party and the Court must resolve all ambiguities and draw all reasonable inferences against that party. *Donahue*, 834 F. 2d at 57. Although the summary judgment procedure allows a Court to dispose of meritless claims without the need for a costly trial, the procedure must be "used selectively to avoid trial by affidavit." *Id.*

B. The Parties' Submissions

In support of their motion defendants have submitted the affidavits and supporting documents of

Robert L. Davis, Commack's Assistant Deputy Superintendent of Schools ("Davis") and Joseph A. Heinlein, the School District's Director of Personnel. Plaintiffs' opposing papers include the affidavits of Lowe and Delisi as well as various supporting documents. In reply, defendants have submitted reply affidavits of Davis and Heinlein as well as affidavits of Mary McHugh and Ronald Vale, two witnesses whose depositions were taken during the course of discovery in this litigation.

C. Defendants' Position

Defendants' moving papers explain, at length, the hiring process used by the School District to fill the vacancies created by the 1985 retirements. The process handled between 750 and 800 applicants. The applicants were divided into the categories of "Internal" and "External" candidates. Those designated as Internal candidates were currently employed, or had been employed in the past, by the School District. All other candidates were designated as External candidates.

The group of 750 External candidates was narrowed, after a paper review, to a group of 100 candidates. Defendant Davis reviewed the resumes of these 100 candidates and narrowed the group to a field of thirty-five. Twenty-three of the thirty-five were interested in the positions and were interviewed by Davis during the summer of 1986. If Davis determined that an applicant performed well on the personal interview, that applicant was given the opportunity to submit a writing sample which was graded. Five of the thirteen vacancies were ultimately filled by External candidates. The lowest

score achieved by an External candidate ultimately hired was an 8.75 on the writing sample coupled with a favorable interview rating.

The Internal candidates, including plaintiffs Lowe and Delisi, were not subject to an initial paper screening of their resumes. Instead, each internal candidate was granted an opportunity to participate in a personal interview and to submit a writing sample. The interview of the Internal candidates were conducted on a team basis by two interviewers. Each interviewer graded the candidate with either a positive or negative response. Positive responses appear as the letter "Y" on defendants' documents and negative responses appear as the letter "N". Because each interviewer graded each applicant, Internal candidates could achieve scores of either (1) "Y/Y"; (2) "N/N" or (3) "Y/N" on this stage of the hiring process. After the team interviews, each Internal applicant submitted a writing sample. The writing samples were graded anonymously and scores ranged from a low of 2.5 to a high of 11.5.

According to defendants, a pool of superior Internal candidates was created as a result of the team interview and writing sample phase of the hiring process. Those candidates who received a "N/N" on the team interview were automatically eliminated from the pool. Those candidates who received a "Y/Y" on the team interview and a writing sample score of at least 8.0 were permitted to continue in the hiring process. If a candidate received a "Y/N" on the team interview, a writing sample grade of at least 9.0 was required to obtain entry to the pool.

After defendant Davis compiled the list of

Internal candidates who made up the pool, a meeting was held and attended by Davis and the elementary school principals in the School District. At that meeting Davis states that the principals were given the opportunity to "plead the case of any Internal candidate who had been eliminated." According to Davis, the principals chose to plead the case of none of the candidates.

As Internal candidates, Lowe and Delisi were interviewed by a team of two interviewers and submitted writing samples. The documents submitted by defendants reveal that plaintiff Lowe scored an "N/N" on the team interview and received a score of 8.5 on her writing sample. According to those same documents plaintiff Delisi scored a "Y/N" on her team interview and received a score of 7.5 on her writing sample. Based upon the hiring process described above, neither Lowe nor Delisi gained entry into the pool of applicants permitted to continue. Lowe was eliminated because of the double "no" rating on her interview. Delisi's "Y/N" rating could result in entry to the pool only if she achieved a score of at least 9.0 on her writing sample. Since Delisi scored only a 7.5 on her writing sample she, too, was eliminated from the field of candidates permitted entry to the pool.

D. Plaintiffs' Response

In response to defendants' submission plaintiffs point to certain flaws in the hiring process as well as various factual discrepancies that tend to undermine defendants' position. Plaintiffs main objection to the hiring process is its subjectivity. According to plaintiffs neither the team interviewers nor the graders of

the writing samples were supplied with a set of objective guidelines to be used when carrying out their tasks.

While it is somewhat conceivable that an interviewer could, under these circumstances, impermissibly consider the applicant's age, a similar danger cannot exist with respect to the writing sample. Defendants have represented that the writing sample was graded anonymously and plaintiffs have not challenged the veracity of that statement. Instead, plaintiffs point to differences in the average score given by any particular grader. In the absence of showing how these grade differences can be attributed to the candidate's age, such differences do little to defeat the defendants' motion for summary judgment.

The factual discrepancies pointed to by plaintiffs relate to alleged departures from defendants' described procedure. Specifically, plaintiffs state that a review of defendants' documents reveal that certain candidates who should not have been permitted to participate in the writing sample phase of the hiring process were allowed to do so. Plaintiffs also point out that the School District's actions with respect to two older candidates belies the alleged neutrality of the hiring process. Specifically, plaintiffs note that Jeanne Fricke, a fifty-six year old Internal candidate who achieved a score of 9.5 on her writing sample and a double "yes" on her interview, was not permitted entry to the pool of applicants continuing on in the hiring process. Plaintiffs also note that Pamela Richmond, who achieved a score of only 7.5 on her writing sample, was hired as an elementary school teacher by the School District in February 1987.

Plaintiffs' submission examines the ages of the teachers hired to fill the thirteen vacancies and notes that although six of the teachers were over the age of fifty, none of those individuals were hired prior to the commencement of this lawsuit in October 1986. In further support of the allegation that it is the School District's policy to replace older, more costly, teachers with younger and less costly teachers, plaintiffs describe their positions as Teacher's Assistants. Apparently, plaintiffs seek to show that while older teachers are employed, at a low rate of pay, as Teacher's Assistants, younger individuals are employed in full teaching positions. Finally, plaintiffs' submission points to statements made by two individuals, Mary McHugh, an Internal candidate, and Betty Polly, the president of the Board of Education. According to plaintiffs, McHugh's deposition testimony and a statement made by Polly at a retirement party reveal that "it was understood throughout the community, that the School District wanted to hire younger teachers and that age was a factor in the hiring process."

E. Defendants' Reply

Defendants' reply papers include the affidavits of Mary McHugh, the individual referred to above, Ronald Vale, one of the team interviewers, Robert Davis and Joseph Heinlein. Each affidavit addresses the specific contentions made by plaintiffs. The affidavits set forth an explanation for discrepancies in the hiring process and attempt to explain away statements allegedly made by certain individuals.

F. Disposition of Defendants' Motion

As the foregoing discussion makes clear, the

Court has reviewed thoroughly the parties' submissions. Although defendants appear to have a strong defense, the Court cannot conclude that summary judgment is warranted. The papers before the Court reveal differences in the parties' interpretation of certain events and conversations and as noted above, the summary judgment procedure should not result in a "trial by affidavit." Put simply, too many factual issues that would have to be decided in defendants' favor to warrant a grant of summary judgment. Accordingly, defendants' motion must be denied.

CONCLUSION

Defendants' motion for summary judgment is denied.

SO ORDERED.

s/
LEONARD D. WEXLER
UNITED STATES DISTRICT JUDGE

Dated: Hauppauge, New York
November 18, 1988